IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 28/07/2003

Coram

The Honourable Mr. Justice P. SHANMUGAM
and
The Honourable Mrs. Justice R. BANUMATHI

A.S. No.1114 of 1987
and A.S. Nos. 1115 to 1117 of 1987
and
Tr. A.S. No.1078 of 1993

A.S. No.1114 of 1987

1. Savithri Ammal (Deceased)
2. K.N. Sambamurthi .. Appellants

(2nd Appellant brought on
record as L.R. Of the deceased
sole respondent as per order
of Court dt. 20.2.98 in C.M.P.
Nos.1211 & 1212 of 1998 (SMAWJ)

-Vs-

1. R.M.SP. Ramasami Chettiar
2. R. Sethuraman
3. R. Ganapathy
4. R. Subramanian
5. Ramalingam
6. Susaimanickam

7. Official Receiver,
Office of the Official Receiver,
District Court,
Nagapattinam,
Tanjore District.

8. K. Raman .. Respondents

A.S. No.1115 of 1987 :

N. Sambamurthi .. Appellant

vs.

1. R.M.SP. Ramasami Chettiar

2. R. Sethuraman
3. R. Ganapathy
4. R. Subramanian
5. R. Ganesan

6. Official Receiver,
Office of the Official Receiver,
District Court Building,
Nagapattinam,
Tanjore District.

7. Venkatachala Naidu .. Respondents

A.S. No.1116 of 1987 :

N. Sankaran .. Appellant

vs.

1. R.M.SP. Ramasami Chettiar
2. R. Sethuraman
3. R. Ganapathy
4. R. Subramanian
5. R. Ganesan

6. Official Receiver,
Office of the Official Receiver,
District Court Building,
Nagapattinam,
Tanjore District.

7. A.R.R. Firm, Money Lender,
rep. by its Managing Partner
Arunachala Chettiar. .. Respondents

A.S. No.1117 of 1987 :

Sundararaman .. Appellant

vs.

1. R.M.SP. Ramasami Chettiar
2. R. Sethuraman
3. R. Ganapathy
4. R. Subramanian
5. Susaimanickam
6. Ganesan

7. Official Receiver,
Office of the Official Receiver,
District Court,

Nagapattinam,
Tanjore District. .. Respondents

Tr.A.S. No.1078 of 1993 :

K.S. Naganatha Iyer .. Appellant

vs.

1. R.M.SP. Ramasami Chettiar
2. Sethuraman
3. R. Ganapathy
4. R. Subramanian
5. Ramalingam
6. R. Ganesan
7. Soosai Manickkam
8. Thur Packkir

9. Official Receiver,
Nagapattinam.

10.K. Narayanaswamy Iyer .. Respondents

PRAYER : A.S. Nos.1114, 1115, 1116 and 1117 of 1987 preferred against the judgment and decree dated 31.8.1987 on the file of the Subordinate Judge, Mayiladuthurai passed in O.S. Nos.38, 39, 65 and 40 of 198 6 respectively. Tr.A.S. No.1078 of 1993 preferred against the judgment and decree dated 31.8.1987 on the file of the Subordinate Judge, Mayiladuthurai passed in O.S. No.69 of 1986.

!For Appellants : Mr. R. Subramanian in all appeals.

^For Respondents : Mr. M.V. Venkataseshan
(For R-6 in A.S. 1114/87;
For R-5 in A.S. 1115 & 1116/87;
For R-5 & R-6 in A.S. 1117/87
and for the proposed parties)

Mr. A. Muthukumar (For R-5 in
A.S. 1114/87 & Tr.A.S. 1078/93)

Mr. P. Rajagopal (For R-6 in
Tr.A.S. No.1078/93)

:J U D G M E N T

P.SHANMUGAM, J.
Plaintiffs are the appellants. The four appeals along with
the transfer appeal are filed against the common judgment dismissing their

suits for recovery of Rs.45,854/-Rs.45,854/-, Rs.45,854/-, Rs.45,854/- and Rs.26,882/- respectively due on mortgage.

2. The parties are described as per their rankings before the trial court. The plaintiffs belong to the same family and are the mother, the father and the sons.

3. The plaintiffs, in their pleadings, have stated that the first defendant, as the family manager, was carrying on paddy business and the plaintiffs had supplied the paddy to them. According to them, defendants 1 to 4 in O.S. Nos.38, 65, 40 and 69 of 1986 respectively, who remained ex parte before the trial court and who were the owners of the suit properties, had borrowed a sum of Rs.25,000/- each from the plaintiffs in O.S. Nos.38/86, 40,86 and 65/86 on 16.6.1969, 14.9.1969 , 15.9.1969 and also Rs.14,650/- from the plaintiff in O.S. No.69/86 on 15.9.1969, agreeing to repay at 6% interest and prescribing the period of redemption as one year, executing separate mortgage deeds. They further state that defendants 1 to 4 were adjudicated as insolvents and the property is vested with the Official Receiver. It is also stated that the other defendants, viz. defendants 5 and 6 in O.S. Nos.38/1986 and

40/1986, the 5th defendant in O.S. No.65/1986 and defendants 5 to 8 in O.S. No.69/1986 are the subsequent purchasers and the mortgages are binding on them. It is stated that the Official Receiver is also added as a respondent and that defendants 8 and 9 in O.S. No.38/1986, the 7th defendant in O.S. No.65/1986 and the 10th defendant in O.S. No.69/1986 are subsequent mortgagees and hence, they are also impleaded as parties. The plaintiffs have pleaded that though the suit claim is more than three years, i.e. from 16.9.1970, the same is in time as the plaintiffs were prevented from filing the suit between 15.1.1975 and 17.1.1978 on account of the moratorium laws. According to them, they believed bonafide that defendants 1 to 4 are entitled to the benefits of those laws and hence they refrained from initiating proceedings during the period from 1975 to 1978. Therefore, the plaintiffs prayed for a preliminary decree directing defendants 1 to 4 to deposit the suit amount and on their failure, to bring and sell the mortgage properties for realisation of the suit amount.

4. Defendants 1 to 4 remained ex parte in all the suits. The other contesting defendants have pleaded that they were not aware of the execution of the mortgage bond by the plaintiffs. The due execution, attestation and passing of consideration on the mortgage bond was specifically denied and it is pleaded that defendants 1 to 4 were not entitled to the benefit of the moratorium laws. Defendants 3 and 4 had filed a suit for partition against defendants 1 and 2 in O.S. No.114 of 1970 and in pursuance to the final decree in I.A. No.189 of 1972 dated 13.1.1973, the Official Receiver took possession of the properties allotted to defendants 1 and 2, who were adjudged as insolvents, for the purpose of administration. It is pleaded that the amounts under the mortgage have to be apportioned as per the terms of the final decree. The Official Receiver advertised for bringing the suit properties for sale in a public auction, which was held on 22.7.1985. The contesting defendants had purchased the property for a valuable consideration and the Official Receiver had executed the sale deed in favour of the defendants on 6.11.1985 and ever since, they were in possession of the

properties. The plaintiffs were fully aware of the said sale. It is further pleaded that the plaintiffs were put to strict proof as to the genuineness of the mortgages and the passing of consideration. According to the defendants, it is strange that the plaintiffs had advanced a huge sum, giving one year time for redemption, but still waited for 17 years to file the suit, which should ordinarily be barred by time. According to them, the borrowal was not bonafide. It is pleaded that there is collusion between the plaintiffs and the alleged debtors and they were attempting to protract the administration of the estate by the Official Receiver which whom the property vested in view of the insolvency. It is further pleaded that on the adjudication of defendants 1 and 2 as insolvents, the plaintiffs did not prompt the Official Receiver to br ing the property for sale either for the alleged charge or free of that. It is also pleaded that the plaintiffs did not take steps for enforcing their rights independently. Their conduct in the sale proceedings would show that the claims were not true and subsisting and in any event, the claim was barred by time. The moratorium laws are not applicable to defendants 1 to 4. The plaintiffs, cannot have any bonafide belief as against defendants 1 to 4 to pursue the claim and the contention of a bonafide belief that they are agriculturists was made only for the purpose of the case.

5. The trial court had framed the following issues :-
i) Whether the mortgage deeds were truly executed and whether the defendants had borrowed the sums mentioned in the mortgage deeds ?
ii) Whether the mortgages would bind the subsequent purchasers ?
Iii) Whether the suits are barred by limitation ?
6. On Issue No.1, the learned Subordinate Judge found that the mortgage deeds are not true and that no consideration had passed in the deed and hence, answered the question against the plaintiff. On Issue No.2, the trial court found that the mortgages would not bind the purchasers. On Issue No.3, it was held that defendants 1 to 4 are not entitled to the benefit of the moratorium laws and that the plaintiff had no bonafides or good faith in refraining from taking legal course on the avowed plea that defendants 1 to 4 are entitled to the benefit and hence, held that the suits are barred by limitation. The trial court accordingly dismissed the suits. The appeals are against the said judgments and decree.

7. Mr. R. Subramaniam, learned counsel arguing on behalf of the appellants submits that all the subsequent purchasers under the sale conducted by the Official Receiver were subject to the suit mortgage and therefore, they are precluded from raising the plea of its validity and the passing of consideration. According to him, the mortgages were executed for a sum representing the price of paddy sold to the first defendant and for discharge of debts due to the defendants. He submits that there was no pleading of collusion and proof for the same between the plaintiffs and defendants 1 to 4. According to him, in the suit for partition filed by the third and fourth defendants in O.S. No.114 of 1970, initially the plaintiffs were impleaded, but later on exonerated and this fact itself would go to show the genuineness of the mortgages. The contesting respondents, having purchased the suit properties subject to mortgage, are not entitled to question them. The plaintiffs have believed in good faith that the several debt laws were applicable to the suit mortgages and therefore, they refrained from

instituting the suits and as such, they are entitled to exclude the time during which the institution of suits was barred by the specific provision of debt laws and therefore, the suits are within the period of limitation.

8. Learned counsel M/s. M.V. Venkataseshan, A. Muthukumar and P. Rajagopal appearing on behalf of the contesting respondents, who are all subsequent purchasers, submit that the suits are collusive in nature and that no consideration passed under the alleged mortgage deeds. According to them, the timing of the suits and the proceedings by itself would make it clear that the borrowals and the suits were intended to benefit defendants 1 to 4 and are collusive in nature. They submit that the plaintiffs have, deliberately and knowing fully about the alleged mortgages, exonerated them in the partition suit and failed to get allotted the non-insolvents' lands. They also submit that defendants 1 and 2 are undischarged insolvents and defendants 2 and 3 have got enough funds and there was no bonafide in not filing the suit for well over 17 years from the date of the mortgages. Once the suit properties get vested with the Official Receiver, the insolvent's title is lost and divested from him. Hence, the purchasers have got a valid title conveyed through court auction. According to them, the suits are clearly time barred and are liable to be rejected. They have prayed for confirmation of the judgments and decree of the court below.

9. We have heard the counsel and gone through the matter carefully.

10. The two points that arise for consideration are :
(1) Whether the suit mortgages are true and genuine ?
(2) Whether the suits are within the period of limitation ?

11. The four plaintiffs belong to the same family and advances were made for similar amounts of Rs.25,000/- each in three cases and Rs.14 ,650/- in the other case, in favour of the first and second defendants on mortgage on the same day for consideration of the supply of paddy and for debts. The mortgage deeds were executed on 14.9.1969, 15.9 .1969 and 16.9.1969 for amounts of Rs.25,000/- each in three cases and for Rs.14,650/in one case. In all these cases, the period of redemption is fixed as one year thereafter. Insolvency petitions were filed on 16.11.1970 and 20.11.1970 and defendants 1 and 2 were declared as insolvents on 1.2.1971 in I.P. No.14 of 1970. The suit for partition in O.S. No.114 of 1970 was filed by defendants 3 and 4 within four days of the filing of the insolvency petition. The final decree was passed in O.S. No.114 of 1970 on 30.1.1973 in I.A. No.189 of 1972 . The suit properties were brought for sale on 11.4.1983 and the plaintiffs have filed applications before the Official Receiver requesting him to include the mortgage in the sale proclamation. Four applications were filed on 10.6.1983 and orders were passed by the Official Receiver to include them subject to encumbrance on 16.6.1983. The contesting defendants have successfully bid for the suit properties and obtained a sale deeds in the year 1979. The suits were filed in January, 1986.

12. On the question whether the mortgages obtained by the plaintiffs are true, genuine and whether there was consideration, the

plaintiffs have examined one Sambamurthy, who is the plaintiff in O.S. No.39 of 1986. He is the son of Savithri Ammal and Naganatha Iyer, plaintiffs in O.S. Nos.38 and 69 of 1986 and the planitiffs in O.S. Nos.40 and 65 of 1986 are his brothers. He speaks about the consideration in those mortgages. Though he had been impleaded as the respondent in O.S. No.114 of 1970, the partition suit filed by defendants, he says that he was not aware of the same. He says that he had gone for the auction in order to bid at the auction. He also filed an application seeking to set aside the auction. In his evidence, he says that since the borrowers are all agriculturists, they were entitled to the benefit of the debt relief laws and hence, the suits for recovery could not be filed immediately. He denied the suggestion that Exs.A.1 to A.4 were executed without receiving consideration. He also denied the suggestion that the account books, Exs.A.5 to A.8 are all created for the purpose of the case. He admits that he had not issued any suit notice before filing the suit.

13. P.W.2 is the attestor to all the mortgage deeds. He says that all the four documents were written on three dates and on all these three days, he went to the godown of the first defendant and he went to the godown of Ramasamy to collect the money for his paddy. He admits that the plaintiffs in O.S. No.38 of 1986 did not come to the godown and that the plaintiff in O.S. No.69 of 1986 and plaintiff in O.S. No. 39 of 1986 were in the rice mill. In the cross-examination, he says that he had gone to the godown accidentally on all these three days. P.W.3, the plaintiff in O.S. No.69 of 1986, says that the mortgage deeds were executed at Nagappattinam even though

the properties were at Kourtallam since the first defendant wanted them to be registered at Nagappattinam and says that he did not enquire and that he does not know why he wanted them to be registered there.

14. In the suit filed by defendants 3 and 4 for partition, O.S. No.114 of 1970, in paragraph 8 of the plaint, they have stated as to why they have impleaded the mortgagees. According to the plaint, they are the creditors of defendants 1 and 2, but they did not admit the truth, validity and the binding nature of the said mortgagees insofar as they affect or purport to affect their share in the joint family properties. According to them, there was no need to execute such mortgages in favour of the defendants nor were they in discharge of any antecedent debts. The debts, according to them, were alleged to have incurred for the new business started and therefore, it would bind the plaintiffs or their share in the suit properties. However, they were exonerated from the suit and it is not clear at whose instance the creditors were exonerated. Ultimately, the 'A' schedule properties were allotted to the Official Receiver who represented the insolvents, namely defendants 1 and 2 herein.

15. The submission of the counsel for the contesting respondents is that the plaintiffs would not have got exonerated in the suit if really the suit mortgages were true and genuine and that they would not have allowed the properties getting allotted to the Official Receiver to answer the creditors of defendants 1 and 2 when the mortgages were executed by defendants 1 to 4 jointly in favour of the plaintiffs, has much force. If really the mortgages were true and genuine and if defendants 1 to 4 had jointly executed those

mortgages in favour of the plaintiffs, they would not have taken the chance by getting the property of defendants 3 and 4 allotted without any encumbrance. Even though the plaintiffs were aware of these proceedings, the final decree of partition and the mortgages, they waited for more than 16 years to file the suits for recovery. The suits were filed only after the successful bidders had taken possession of the suit properties in pursuance to the court sale.

16. Apart from the above circumstances and the timing, we find that the following amounts are advanced in the following manner under Exhibits A.1 to A.4 :-

Ex.No. Dated In favour of Consideration

A.1 16.9.1969 Savithri Ammal (O.S.38/86) Rs.25,000/-*

[*] Rs.15,000/- representing the amount due on supply of paddy and Rs.10,000/- by cash.

A.2 14.9.1969 Sundararaman (O.S.40/86) Rs.25,000/-

A.3 15.9.1969 N. Sankaran (O.S.65/86) Rs.25,000/-*

[*] Rs.10,000/- borrowed on promissory note by defendants 1 to 4 on 19.1.1959 and Rs.3,900/- borrowed on promissory note on 24.7.1964 including interest, totalling Rs.21,110/-; Rs.3,890/- due for the supply of paddy.

A.4 15.9.1969 KS.Naganatha Iyer (O.S.69/86) Rs.14,650/-*

[*] Rs.5,370/- due on Promissory Note and Rs.9,280/- due for the supply of paddy.

17. Inasmuch as the consideration and the truth and genuineness of the suit mortgages were questioned, the burden is on the plaintiffs to prove that these mortgages were executed for a valuable consideration. They have examined P.Ws.1 to 3. P.W.2 is the attestor and he is said to be one of the suppliers of paddy to the first defendant. He says that he went to the first defendant's godown and on his visits accidentally, he has signed Exs.A.1 to A.4. He has stated, "3 ehl;fs; bjhlh;e;J gj;jpu';fs; vGjpehh;fs;/ ehd; vnjr;irahf nghFk;bghGJ ifbaGj;J bra;njd;" ("The documents were written on three consecutive days. I signed in them when I went there accidentally"). The presence of P.W.1 on all the three days of execution of the mortgage deeds consecutively appears to be artificial and suspicious, especially when the plaintiffs had not shown or filed any document to prove that P.W.2 also had supplied paddy to the first defendant.

18. Though Ex.A.1 refers to the payment of cash to the first defendant and the execution of the mortgage for Rs.25,000/- on 16.9.1969, in addition to adjustment of the amount due towards the supply of paddy, nobody

has spoken about Savithri Ammal going to the godown of the first defendant to pay the amount. The Account Books, Exs.A.5 to A.8, said to be the note-books maintained by the plaintiffs towards the supply of paddy, do not appear to be a genuine account kept in the usual course representing the account for the supply of paddy. P.W.2 has admitted that they would have obtained receipts for the supply of paddy, which are not produced before this court. These Account Books are in the form of 40 Page Note Books written by the same person in few pages as accounts for the period 1965 - 1969. P.W.2 has admitted that they have not maintained the account in reference to the supply of paddy to other traders and that they have also not maintained the account in reference to the second season padd y and no reference is made as to the quality of paddy supplied. Admittedly, entries of the accounts stopped with the year 1969, after the suit mortgages were executed. If really these accounts were maintained in the regular course, the plaintiffs, who have admittedly supplied paddy, would have written their accounts for the subsequent period. P.W.2 had also admitted that they have not compared their accounts with that of the first defendant and that he does not know whether account books are maintained by the first defendant. The plaintiffs are said to be supplying paddy to the defendants from 1965 to 1969 and it is highly doubtful whether the agriculturists would have continued to supply paddy to a trader who could not pay for their paddy and who was already indebted to them, as evidenced by the promissory notes and also as to whether they would have agreed to take a mortgage for the sums due on the promissory notes. In these circumstances, it appears that the alleged endorsement in the promissory notes and account books appear to have been clearly created for the purpose of the case.

19. As rightly pointed out, in Ex.A.2, mortgage deed, apart from the paddy dues, there is a reference to the assignment of a promissory note which has been executed in favour of one Rajam Iyer, which has been marked as Ex.A.13. Similarly, in Ex.A.3, the assignment of promissory notes covered under Exs.A.11 and A.12 is said to have been discharged. The mortgage deed executed in favour of Sundararaman, the plaintiff in O.S. No.40 of 1986, was only aged 14 years at that time, refers to consideration in the form of discharge of a promissory note, Ex.A.13 for Rs.3,900/- dated 24.7.1964 with interest, coming to Rs.5,110/- and for the supply of paddy, Rs.19,890/-, totalling Rs.25,000/-. Ex.A.13, promissory note is executed in fa vour of one Rajam Iyer, who is said to be another son of Naganatha Iyer. Rajam Iyer had been examined and it is not stated as to how the promissory note executed in his favour is said to be discharged in Ex.A.2. The various amounts in decimals were made up to make out a total sum of Rs.25,000/- in the mortgage deeds which also appears to be artificial.

20. The properties covered under these mortgages are situated at Kuthalam Village, whereas the mortgage deeds were registered at Nagapattinam District Office. When a specific question was put to P.W.3 as to how they agreed to get the mortgage deeds registered at Nagapattinam, he had replied stating that they did not enquire with the first defendant about this. It is not in dispute that the District Registrar's Office is located far away, i.e. 50 to 75 kilometers from the suit property and there are two Sub-Registrar Offices, one at Kuthalam itself and another at Mayiladuthurai on the way to Nagapattinam and no evidence has been let in explaining the reasons for such

registration.

21. In the suit O.S. No.114 of 1970 filed by defendants 3 and 4 herein for partition, admittedly, the plaintiffs were impleaded as defendants 3 to 7 and the claim of defendants 3 and 4, who are the minor sons of the first defendant Ramasamy Chettiar, is that the mortgages were executed over the joint family properties and that there was no need or occasion to execute the same. In spite of such an averment, the plaintiffs herein, who were parties to the suit and who were fully aware of the suit, were exonerated from the suit. The plaintiffs did not think it fit to question their exoneration in order to safeguard their interest. It appears to be very strange that when mortgages were executed by and on behalf of the joint family representing the sons of the first defendant, they would have agreed to go out of contest in the suit for partition and even if they were exonerated, under normal circumstances, they would have questioned their exoneration and insisted for the discharge of the credit. Though they were the secured creditors, they could have seen to get the non-insolvent's land allotted for their claims to avoid litigation.

22. Yet another important aspect is that the plaintiffs have waited after the period of one year for redemption of mortgage, which expired in the year 1970, till the year 1986 for filing the suits for recovery. For all these reasons, viz. the timings of the execution of the mortgages, the immediate filing of the insolvency petition within six months thereafter and other suspicious circumstances set out, clearly show that the mortgages are not true and genuine and that there is no consideration for the same. Therefore, the finding of the court below that the mortgages were created for the purpose of the case collusively in order to avoid the creditors, is correct. We therefore find that the mortgages, Exs.A.1 to A.4 are not true and genuine and there was no consideration for the same. In view of this conclusion, the consequence of vesting of the property w ith the Official Receiver does not arise for consideration.

23. On the second question, we find that the time for redemption of the mortgages expired on 15.9.1970 and 16.9.1970 and the last date for filing the suits for recovery would be 15/16.9.1982. But, the suits were filed in January, 1986. The case of the plaintiffs is that they were under the bonafide belief that defendants 1 to 4 were agriculturists and that therefore, they were entitled to exclude the moratorium period as pleaded by them in the plaint, from 15.1.1975 to 14.7.1 978, i.e. 3 years 5 months and 28 days. According to the plaintiffs in this case, as a matter of fact, they are entitled to add 4 years, 5 months and 28 days to the 12 year period of limitation. Therefore, assuming that the lesser period claimed in the ir plaint is allowed, the suits are within the time. Whereas, the learned Subordinate Judge has found that the plaintiffs could not have bonafide believed that defendants 1 to 4 are entitled to the benefit of the Act inasmuch as they were owning rice mill, car, bungalow and that the supply of paddy to the tune of 500 bags would itself show that they were affluent and could not be debtors.

24. The question of bonafide belief for the purpose of claiming the benefits of the Act has been the subject matter of a series of decisions of this court. In Mohana Sundaram vs. Sengappa Gounder [1987 T. L.N.J. 151], Srinivasan, J., as he then was, held that if the statement of the plaintiff in the box that he believed in good faith that Section 3 of Act 10 of 1975 would apply to the suit for recovery of the amount due to him, that would be sufficient to exclude the period. In Gomathi Ammal vs. Senthattaiya Pillai [1988 (2) M.L.J. 117], a learned Judge of this Court has held that considering the relief under the Tamil Nadu Indebted Agriculturists (Temporary Relief) Act 105 of 19 75 and Act 15 of 1976 that if the defendant would have been agriculturist under Section 5(2), but for the assessment of income or agricultural income tax or sales tax, there shall be a conclusive presumption that the plaintiff is restrained from instituting a suit on the belief in good faith that the said defendant was an agriculturist. The language of Section 5(2) draws a conclusive presumption under Section 4 of the Indian Evidence Act, i.e. when one fact is declared by this act to be conclusive proof of another fact, the Court shall, on proof of one fact, regard the other as proved and shall not allow evidence to be given for the purpose of disproving it. The learned Judge has held that even assuming that the defendant is not an agriculturist within the meaning of these two Acts, the plaintiff must be deemed to have believed in good faith that he was entitled to the benefit of this Act and refrained from instituting the suit. The period between 1 5.1.1975 and 14.7.1978 is, therefore, to be excluded.

25. In Kangan vs. Kannammal [1996 (2) L.W. 92], D. Raju, J., as he then was, while dealing with the Tamil Nadu Debt Relief Act 40 of 1979 , held that the legislature could not be considered to have intended to create a nebulous or doubtful state of affairs by using the word "barred" intending the said expression to apply and to cover only cases of permanent and total bar on account of such statutory discharge of the debt. The debt with reference to which, repeal of the Act 40 of 1978 has been made and its replacement by provisions of the Tamil Nadu Act 40 of 1979 excluding Sections 32 to 34 with retrospective effect from publication of the coming into force of the Tamil Nadu Act 4 0 of 1978, the prospective application given to Sections 32 to 34 were intended to ensure availability of the continued benefit of the exclusion of time for limitation in case of all debts irrespective of the fact whether the discharge given under the Tamil Nadu Act 40 of 197 8 is total or partial. It was further held that it is a well accepted principle that the law of limitation does not destroy the right, but only denies the remedy to enforce, through Court, beyond the period of limitation prescribed for vindicating the rights of the parties. Having regard to the said position underlying the law of limitation, whenever there is room for doubt, the benefit of the same should be given to the holder of the rights and any construction otherwise would bring a more drastic situation than what was really intended by the statute.

26. In Bichel Naidu vs. Muthuramalingam [1962 (2) M.L.J. 352, a Division Bench of this Court has held that the period of exclusion is available to a creditor where the cause of action or the transaction itself is anterior to this period. Obviously, a creditor is not entitled to the benefit of the entire period where the cause of action itself arises upon a debt

within the period and suspension of the ordinary law regarding limitation operates upon it, disable him from filing a suit only for the remainder of the period. In Manickam Chettiar vs. Ramanatha Thevar [1996 (2) L.W. 406], AR.Lakshmanan, J., as he then was, after referring to almost all the decisions on the subject, held that the plaintiff clearly averred in the petition that he was under the bonafide belief that the respondent was entitled to the benefit of the various debt relief legislations and therefore could not come to the court at the earliest point of time. There is no reason for the court to disregard the bonafide claim of the plaintiff for his not coming to the court at the earliest point of time. His Lordship approved the view taken by D. Raju, J. in [1996 (2) L.W. 92] that the law of limitation does not destroy the right, but only denies the remedy. His Lordship held that the moratorium period, viz. 4 years 4 months and 27 days is to be excluded.

27. In P. Narasimman vs. P.V. Narasimman [A.I.R. 1973 A.P. 162], a Division Bench of the Andhra Pradesh High Court had held that where a suit was decreed against all the defendants on a common ground that the debt contracted by one of the defendants as the Kartha was for a legal necessity and in an appeal filed by one defendant, the common finding was reversed by the High Court, the other defendants were competent to file Letters Patent Appeal, though they had not appealed against the decree of the trial court. If a debt contracted by the Kartha of a joint family is not for a legal necessity or for the family benefit, it is not binding on all the coparceners and not only the defendants who have preferred the appeal. The court is to exonerate other coparceners under Order 41, Rule 33 of the Code of Civil Procedure.

28. In Naguru Subbayya vs. Nagu Pedala Subbayya [1937 (2) M.L.J. 703], a Division Bench of this Court has held that the statute of limitation for the maintenance of an action at law, once it has commenced to run, will continue to run in spite of the presentation of the petition in insolvency. If the order of adjudication is made, the operation of the statute of limitation is suspended till the date of the annulment and if the period between that of adjudication and that of annulment is excluded, the statute begins to run immediately on annulment. So, under the law as it stands, a prudent creditor, in order to keep his debt alive, would be obliged to file a suit to save it from the bar of limitation in spite of insolvency. A Full Bench of this Court, in Manimegalai Ammal & Others vs. Swamidurai Padayachi [2001 (2) M.L.J. 826], in which one of us is a party, has held that the period of limitation for filing a suit for recovery of debts by Act 40 of 1 979 between 15.1.1976 to 13.6.1979 is to be excluded for computing the period.

29. In Hindustan Ideal Insurance Co. vs. P. Sattayya [A.I.R. 1961 A.P. 183], a Division Bench of the Andhra Pradesh High Court has taken the view that the mortgagor is estopped from disputing the title to the hypothecated property and the subsequent purchasers of his right to the property are likewise estopped. But, the question whether the mortgage itself is genuine or not and whether consideration had passed shall go to the root of the matter and the contesting defendant cannot be precluded from questioning the same.

30. A Division Bench of this Court, in Karuppan vs. Deivasigamani [A.I.R. 1954 Madras 650], has held that the decree of court contemplated in Section 60 of the Transfer of Property Act is the final decree in a mortgage foreclosing the mortgagor of his right to redeem. It is open to a sub mortgagee, in an action to enforce his mortgage, to obtain a decee foreclosing the right of not merely a mortgagor, but also of the main mortgagor to redeem. The final decree passed in such an action would operate to extinguish the right of redemption. It was also held in that case that there was no adjudication of the rights of parties under the original mortgage. The amount due by the original mortgagor to the mortgagee was not declared and there was no provision for any payment of surplus sale proceeds to him and that decree would not be read as declaring the right of redemption in respect of the original mortgage and neither the decree nor the execution proceedings in pursuance thereof would operate to extinguish the right of the mortgagor to redeem the original mortgage. There cannot be any dispute on the law laid down by the Division Bench and there is no serious argument that the execution of sale would operate to extinguish the right of the mortgagor to redeem the original mortgage in this case and we have held that the mortgage itself is not true and genuine.

31. In the light of the view taken by the Apex Court and by this Court in the series of decisions referred to above, the statement of the plaintiffs in this case that the defendants are agriculturists and that they believed bonafide that in view of the moratorium laws, they could not file the suit earlier, has to be accepted and upheld. The court cannot take notice of the existence of a car and a bungalow etc. in order to disentitle the claim of the execution. Therefore, insofar as the finding of the learned Judge on the limitation point is concerned, the same is sustained and the suit cannot be held to be barred by limitation.

32. For all these reasons, the submission of the counsel for the appellants that the contesting respondents cannot question the mortgage, they having purchased the property subject to the mortgage, cannot be correct. As rightly pointed out in reference to the decisions above, Section 59-A of the Transfer of Property Act is an answer. All the rights of the mortgagors are available to the transferee and if the mortgagor could have questioned the very mortgage itself on the ground of no consideration, the transferee is also entitled to the same. Hence, we do not find any merit in the said submission.

33. For all the above reasons, the appeals and the transfer appeal are dismissed. However, there will be no order as to costs. Consequently, the connected C.M.Ps. are ordered.

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Index : Yes
Internet : Yes

To

1. The Subordinate Judge,
Mayiladuthurai (With Records).

2. The Record Keeper,
V.R. Section,
High Court, Chennai.